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Via FedEx Next Business Day Service

Robert Thompson, General Counsel
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814-4174

Re: Comments on CTA's Request to Revise the Agency Fee Regulations

Dear Mr. Thompson:

I am a staff attorney with the National Right to Work Legal Defense Foundation. The Foundation, established in 1968, is a nonprofit, charitable organization providing free legal aid to employees whose human or civil rights have been violated by abuses of compulsory unionism. Foundation staff attorneys, including myself, have represented, and continue to represent, thousands of California nonunion public employees in federal and state courts, administrative agencies and PERB. During 1988 and 1989, I also participated in, and commented on, the formation of the existing agency fee regulations, 8 CCR §§ 32990-32997, now under massive attack by the unions.

Foundation staff attorneys represented the nonunion employees in all the court and PERB cases mentioned in CTA's August 11, 2004 letter ("CTA letter"), requesting revision of PERB's agency fee regulations, except *Paso Robles Public Educators (Andrus)* (2004) PERB Decision No. 1589. Foundation-supported cases have established the law in agency fee matters. *See Air Line Pilots Ass'n v. Miller* (1998) 523 U.S. 866; *Chicago Teachers Union v. Hudson* (1986) 475 U.S. 292; *Ellis v. Railway Clerks*, 466 U.S. 435 (1984) 466 U.S. 435; and *Abood v. Detroit Bd. of Educ*. (1977) 431 U.S. 209. Without the Foundation, individual employees would unlikely have an advocate, there would be fewer rights for agency fee payers and no agency fee regulations.

For the reasons stated below, there is no basis for PERB to revise its agency fee regulations. PERB should maintain its agency fee regulations exactly as they are or with very minor adjustments. Gutting the regulations, as CTA and the other unions propose, would return nonmembers to the "days of darkness" that preceded the promulgation of the existing agency fee regulations.

Contrary to the unions' claims, *see* CTA letter at 1-2, the agency fee regulations are still necessary because they inform employees, employers and unions in simple, nonlegal language of the proper statutory and "constitutional requirements for [a u]nion's collection of agency fees." *Hudson*, 475 U.S. at 310. PERB recognizes that it "has enacted agency fee regulations to guide [unions] in administering agency fee agreements," *California Teachers Ass'n* (*Boynton*) (1991) PERB Decision No. 906, slip op. at 3, and "to protect nonmembers' constitutional rights." *San Ramon Valley Educ. Ass'n, CTA/NEA* (*Abbot and Cameron*) (1990) PERB Decision No. 802, slip op. at 13.

Hudson generally requires: "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." The regulations explain and detail those three general requirements in easy to understand language under the headings: "Notification of Nonmember" (§ 32992); "Agency Fee Appeal Procedure" (§ 32994); and "Escrow of Agency Fees in Dispute" (§ 32995). The regulations also contain provisions on the "Amount of Agency Fee" (§ 32991); "Filing of Agency Fee Appeal Procedure" (§ 32996); and "Compliance" (§ 32997). For example, the regulations cover: 1) the contents, timing and basis of the explanation to nonmembers; 2) the timing, burden of proof, costs and procedures of the challenge; and 3) the terms of deposit, withdrawal and interest of the escrow account.

The regulations further explain the rights of agency fee payers, who already suffer "'a significant impingement on their First Amendment rights' [by] the agency shop itself." *Hudson*, 475 U.S. at 307 n.20 (quoting *Ellis*, 466 U.S. at 455). That is why the United States Supreme Court held "the **government** and union have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee's ability to protect his rights." *Id.* (emphasis added). The development of evolving case law cannot satisfy that governmental responsibility, which is properly met by these regulations.

The agency fee regulations also reduce the number of unfair practice charges PERB has to investigate because nonmembers can easily judge whether the agency fee collections are legal or not. When nonmembers see that the union is complying with the agency fee regulations, they know that an unfair practice charge would be futile. Under the proposed union revisions, nonmembers would not know whether the unions were complying with the statutory and constitutional requirements for the collection of agency fees and would file more unfair practice charges, even when unions are complying with the case law, because the nonmembers would be in the dark.

Labor and management have come to rely on the agency fee regulations. For example, section 16.5 of the collective bargaining agreement between the San Diego Unified School District and the San Diego Education Association/CTA/NEA specifically refers to the PERB agency fee regulations, requires the Association to abide by such regulations and "[u]pon request of the unit member, [requires] the Association [to] provide a copy of the most current set of PERB regulations regarding [agency fees]." *See* http://www.sdea.net/member/dues.html.

Recent amendments to the collective bargaining statutes, affecting public school, community college, university and Los Angeles transit district supervisory employees, require implementation of mandatory agency fee deductions upon the mere request of the union without any negotiation with the public employer and without a vote of unit members. *See* Educational Employment Relations Act, Cal. Gov't Code §§ 3543(a) & 3546(a); Higher Education Employer-Employee Relations Act, Cal. Gov't Code § 3583.5; and Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act, Cal. Pub. Util. Code § 99566.1. These employees, suffering the "sneak attack" of automatic agency fees, have a greater need for the information contained in the existing agency fee regulations because they lack the normal information and warning that comes from agency fee negotiations or elections.

Thus, the existing agency fee regulations remain necessary because they give notice to nonmembers about their rights in an agency shop situation consistent with the *Hudson* rationale and the statutory authorization of agency fees in the public sector.

The unions' proposed revisions leave only the provisions that favor the unions, while repealing the others -- the heart of the regulations. Most telling about the unions' motive in removing most, but not all agency fee regulations, is the fact that they propose leaving the exhaustion regulations that favor the unions, but are contrary to recent U.S. Supreme Court precedent. *Miller*, 523 U.S. at 876-77. The union revisions totally delete sections 32990 (Agency Fee), 32991 (Amount of Agency Fee), 32992 (Notification of Nonmember), 32995 (Escrow of Agency Fees in Dispute), and 32997 (Compliance -- which makes violating the agency fee regulations an unfair practice). They gut most of section 32994 (Agency Fee Appeal Procedure), leaving only the exhaustion provision favorable to unions. Only the two sections concerning union filing requirements with PERB are retained, § 32993 (Filing of Financial Report) and § 32996 (Filing of Agency Fee Appeal Procedure).

Accordingly, the nonmembers are both left in the dark and deprived of a meaningful understanding of what agency fee rights PERB will protect. Darkness and lack of information are the unions' best friend. However, PERB is the neutral agency that oversees public-sector collective bargaining in California for the benefit of the public and all those covered by the seven statutes it administers, not just unions. Light and information are the best friend of the public and the employees, employers and unions covered by those statutes. The intended beneficiaries of PERB's services are not served by relying on the uncertainties of case law and lawyers' interpretations.

The unions' rationale for their proposed revisions does not support the meat-axe approach they request PERB to administer. First, the unions contend, "PERB's agency fee regulations constitute a rare instance of substantive law being established via regulation. * * * [Instead,] the usual approach of establishing substantive law through development of caselaw should be followed." CTA letter at 1. However, a few months after the promulgation of the agency fee regulations, the California Supreme Court held "that nonmember employees' [statutory] right to prevent the union's use of their [agency] fees for purposes not authorized by the [statute] requires that those employees be afforded the procedural safeguards prescribed in [*Hudson*]." *Cumero v. PERB*, 49 Cal.3d 575, 605 (1989). Certainly, with this command, PERB had the authority to establish those "procedural safeguards" through regulations and case law. Furthermore, PERB is not alone in promulgating agency fee regulations. *See* 456 Code of Massachusetts Regulations § 17.00 et seq.

Second, the unions' claim that "PERB's agency fee regulations conflict with current caselaw." CTA letter at 2. Even if that were true, which it is not as is demonstrated below, the proper approach would be to make minor changes in the one regulation that they assert is in conflict, § 32992(b), not to gut all substantive provisions. Furthermore, their position, *see* CTA letter at 3, "that additional conflicts will develop" justifies the "eliminat [ion of all] substantive regulations entirely" is ludicrous. If that were the case, PERB would be incapable of promulgating any regulations. The possibility of change and conflict is precisely why PERB has procedures to revise and amend its regulations. In fact, the agency fee regulations have been amended at least eight times in 2000, 2001 and 2004. *See* 8 CCR § 32990 (HISTORY) et seq. You don't throw the baby out with the dirty bath water; you just change the water.

The unions complain that section 32992(b), requiring that the calculation of the chargeable agency fees must be made on the basis of an independent audit, conflicts with the Ninth Circuit holding in *Harik v. California Teachers Ass'n* (9th Cir. 2003) 326 F.3d 1042, 1049, that extremely small local unions need not conduct an audit at all. *See* CTA letter at 3. *Harik* is inconsistent with the Supreme Court's explicit directive that "adequate disclosure surely would include the major categories of expenses, as well as **verification by an independent auditor**." *Hudson*, 475 U.S. at 307 n.18 (emphasis added), *see also id*. at 310 (discussing role of "independent audit"). *Harik* has been criticized specifically and not followed by the Third Circuit in *Otto v. Pennsylvania State Educ. Ass'n* (3d Cir 2003) 330 F.3d 125, 131-32. "We do not find [the Ninth Circuit's approach] an available option unless the Supreme Court tells us otherwise." *Id*. at 132.

Because PERB promulgated the existing agency fee regulations to comply with the statutory requirements regarding agency fees as well as the *Hudson* decision, *see* 8 CCR § 32990 (NOTE) et seq. (authority cited after each section), not just to comply with the constitutional rights enumerated in *Hudson*, it is not required to follow the Ninth Circuit's ill-advised interpretation of *Hudson*. Legislatures and administrative agencies may grant broader rights than those required by the constitution. PERB's main responsibility is to effectuate the policies of the seven collective bargaining statutes it administers. These statutes require unions that collect agency fees to file financial reports with PERB. *See* Cal. Gov't Code §§ 3502.5(f), 3515.7(e), 3546.5, 3584(b), 3587, 71632.5(f) & 71814(f); Cal. Pub. Util. Code § 99566.3. Moreover, the combined requirements of the statutes and *Hudson* as to independent audits are unresolved at the state court level.

Moreover, PERB does not always follow the evolving Ninth Circuit case law in this area. In *Paso Robles Public Educators*, slip op. at 9-10 & 11, PERB held that both *Hudson* and section 32992(c)(1) require unions to provide the *Hudson* notice at least 30 days prior to the collection of agency fees. PERB also determined that the proper remedy for the collection of fees prior to the distribution of the required *Hudson* notice is the return to the nonmembers of all amounts, with interest, that were collected prior to the union's full compliance with section 32992(c)(1). Unions might argue that PERB's determination of the violation and remedy is inconsistent with decisions of the Ninth Circuit. In *Grunwald v. San Bernardino City Unified School Dist.* (9th Cir. 1993) 994 F.2d 1370, 1375, a panel of the court found that the union did not violate *Hudson* by collecting agency fees **before** the notice was distributed because the union showed that advance notice was impossible or, at any rate, far more costly or cumbersome. In *Prescott v. County of El Dorado* (9th Cir. 1999) 177 F.3d 1102, 1109-10, another panel rejected an argument that the proper remedy for a *Hudson* violation should be a refund of **all** fees collected prior to full compliance with *Hudson*. However, other labor boards have determined agency fee violations and remedies contrary to the federal courts. *See Elvin v. Oregon Public Employees Union* (1992) 313 Or. 165 (full restitution for *Hudson* violations); *Wareham Educ. Ass'n v. Labor Relations Com'n* (1999) 430 Mass. 81, 89-90 (local audit required and full restitution for *Hudson* violations).

If PERB's agency fee regulations must be consistent with the evolving case law in this area, then it would have to repeal the exhaustion requirements of section 32994(a): "no complaint shall issue until the agency fee objector has first exhausted the exclusive representative's Agency Fee Appeal Procedure," one of the three regulations the unions want retained. In 1998, nine years after the exhaustion regulation was issued, the United States Supreme Court held that while "*Hudson*'s requirement of 'a reasonably prompt decision by an impartial decisionmaker,' 475 U.S., at 307, aims to

protect the interest of objectors by affording them access to a neutral forum in which their objections can be resolved swiftly; **nothing in our decision purports to compel objectors to pursue that remedy**. *See id.*, at 307." *Miller*, 523 U.S. at 876-77 (emphasis added). Furthermore, the Court noted : "Indeed, *Hudson*'s emphasis on the need for a speedy remedy **weighs against exhaustion**, even through an arbitration procedure [is] intended to be expeditious, * * *. We resist reading *Hudson* in a manner that might frustrate its very purpose, to advance the swift, fair, and final settlement of objectors' rights." *Id.* at 877 (emphasis added).

Even if PERB feels compelled to follow *Harik*, there is no basis for totally repealing the audit requirement of section 32992(b). The Ninth Circuit did not excuse all unions from conducting an independent audit. Instead, it only allowed local unions with annual revenue of less than $50,000 an exemption from "providing audited financial statements" as long as they provided "an independent verification" or "adequate accessible information using an auditor verifiable methodology that could verify [the local's] expenditures." *Harik*, 326 F.3d at 1047 & 1049.

Third, the unions also complain that the same section requires that the audit shall be made available to nonmembers when the Ninth Circuit held in *Cummings v. Connell* (9th Cir. 2003) 316 F.3d 886, 892, that the entire audit need not be provided to fee payers with the *Hudson* notice: only the auditor's verification must be provided with the notice. *See* CTA letter at 3. However, there is no conflict. Section 32992(b) does not require that the audit be included with the *Hudson* notice, it only requires that the independent audit "shall be made available to the nonmember." Apparently, the notice only needs to explain how nonmembers can secure the audit. *Cummings* only held that "a full copy of the audit [does not] always [have to] be included in the notice." *Id*.

For the reasons stated above, I request, on behalf of the nonunion public employees that I represent, that the unions' request that PERB revise its agency fee regulations be rejected and the regulations be left alone.

Sincerely,

/s/

Milton L. Chappell
Staff Attorney

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